

3-23-1976

# A-1 Auto Parts, Inc. and David C. Dennison v. Verna Capps

Appellee's Brief 1976-SC-0167

# APPELLEE'S BRIEF

# SUPREME COURT OF KENTUCKY

**FILE NO. 76-167**

**A-1 AUTO PARTS, INC. AND DAVID C. DENNISON.....Appellants**

**VS.**

**BRIEF FOR APPELLEE**

**VERNA CAPPS.....Appellee**

**APPEAL FROM WARREN CIRCUIT COURT, DIVISION I**

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This is to certify that a copy of the within brief was this day delivered to Jeff O'Grody, Attorney for Appellants, to Trial Judge Robert M. Coleman, Warren Circuit Court Division I and to Wm E. Allender, successor, Warren Circuit Court Division I.

This 22nd day of March 1976.

J. O. Milliken Jr.
Attorney for Appellee

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## BRIEF FOR APPELLEE

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## STATEMENT OF QUESTIONS PRESENTED

Did the Warren Circuit Court abuse its discretion in refusing to vacate judgment, when the case was docketed for trial by order of the Court dated April 28, 1975, setting the case for trial on September 5, 1975, at which time the Appellants failed to appear, evidence was heard, and judgment rendered thereon?

## STATEMENT OF THE CASE

### A. Nature of the Proceedings

This is an Appeal from the order of the Warren Circuit Court overruling motion to vacate judgment, judgment having been granted in favor of the Appellee in the amount

of $10,000.00, plus interest on a loan made by Appellee to the Appellants on October 4, 1972.

B. Counter Statement of Facts

On February 7, 1975, counsel for Appellee filed a motion to docket the above styled cause for trial (T.R. 20). A copy of the motion was delivered to counsel for Appellant on February 7, 1975 (T.R. 20).

Counsel for Appellee filed a second motion to docket for trial on April 16, 1975; notice was given that the motion would be brought before the Honorable Robert M. Coleman, Judge, Warren Circuit Court, Division No. 1, on April 25, 1975 (T.R. 22). A copy of the motion and notice was delivered to counsel for Appellants on April 16, 1975 (T.R. 22).

Pursuant to said motion, the Court entered an order on April 28, 1975 setting the case for trial on September 5, 1975 (T.R. 23).

The case was called for trial on September 5, 1975. The Appellee was present in Court and represented by Counsel, and the Appellants failed to appear for the trial. Whereupon, the Court heard evidence and granted a judgment for the Appellee for the sum of $10,000.00 plus interest from October 4, 1974 until paid, interest having been paid by the Appellants only to October 4, 1974. The judgment was officially signed on September 8, 1975 (T.R. 24).

Appellants filed a motion to vacate judgment on September 22, 1975 (T.R. 25) and the hearing on said motion was set by notice from Appellants counsel to be heard on October 10, 1975 at 10:00 a.m. (T.R. 26).

On that date, a hearing was held on said motion, and subsequently an order was entered on October 20, 1975 overruling the motion to vacate the judgment (T.R. 27).

## ARGUMENT

The Court did not abuse its discretion in overruling motion to vacate judgment.

Appellants argue that the judgment entered by the Court was a default judgment and that they were entitled to be served with a written notice three days prior to the hearing, and cite Civil Rule 55.01.

In the first place this judgment was not a default judgment, which would require notice to Appellants. It was a judgment entered upon a trial of the case pursuant to notice (T.R. 22) and order of the Court (T.R. 23).

Appellants had notice on April 16, 1975 that Appellee would on April 25, 1975, ask the Court to set the case for trial (T.R. 22).

Further, Appellants had notice that an order was entered on April 28, 1975 setting the case for trial on September 5, 1975, counsel is presumed to have knowledge of the order entered in the case (T.R. 23).

No claim is made that Appellants were not fully advised that the case was set for trial on September 5, 1975.

It is admitted and the record so shows that Appellants did not appear for the trial. See Appellants brief, Page 5, from which we quote as follows: "Appellant admit that he

himself was not physically present in the courtroom on the appointed day for trial".

Counsel for Appellant states in his brief that he was present and made an oral motion for continuance, but he did not say in his brief, nor does the record disclose when he appeared, before or after the evidence was heard and judgment was granted. The judgment does not show Appellant's counsel present at the trial (T.R. 24).

The judgment of the Court conclusively shows that Plaintiff and her counsel were present and that the Defendants failed to appear (T.R. 24).

Counsel for Appellants state in Appellants' brief, "no proof or evidence of any nature was heard upon behalf of either party".

There is nothing in the record to substantiate this statement, but to the contrary, the judgment, shown on Page 24 of Record, plainly states that evidence was heard. We quote from the judgment as follows: "This cause coming before the Court for trial by jury, the plaintiff being present and represented by counsel and the defendants having failed to appear, **evidence being heard** and the Court being advised.

IT IS ORDERED AND ADJUDGED that the Plaintiff recover of the defendants the sum of $10,000.00 plus interest at the rate of 7% (seven per cent) per annum from October 4, 1974, until paid and the costs of this action, for all of which the plaintiff may have execution."

Appellee contends that this was not in fact a default judgment in the ordinary sense of the word, for the reason

that this case was set for trial on a specific date; the Appellants knew the date of the trial and failed to appear, and the Court proceeded with the trial and heard evidence in the absence of the Appellants, who failed to appear for the trial in spite of their knowledge that it had been set for that specific date.

Assuming, for the purpose of argument, that this was a default judgment, which we do not concede, we point out that Rule 55.02 makes the following provision relating to this issue: "For good cause shown, the Court may set aside judgment by default in accordance with rule 60.02".

Rule 60.02 provides that:

(a) A court may, upon such terms as are just, relieve a party of his legal representative from its final judgment, order, or proceeding upon the following grounds: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) perjury or falsified evidence, (4) fraud affecting the proceedings, other than perjury or falsified evidence; (5) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief."

None of these reasons were set forth in the motion to vacate.

In the case of **Richardson vs. Bruner**, 327 S.W. 2d 572,

the Court in considering a similar case affirmed the judgment of the lower Court, which had declined to vacate a default judgment. We quote from this case as follows;

"Let us consider the first motion to vacate under CR 60.02. For the purpose of this discussion we shall assume that the defendant, Richardson, had a valid defense. While highly questionable we shall likewise assume that he properly defined that defense in his motion. This does not of itself entitle the defendant to the relief sought. He must explain why he did not present that defense upon the trial and thus excuse his default. **Dant v. Progress Paint Mfg. Co.**, Ky., 309 S.W. 2d 187".

In the case at bar it is to be noted that the Appellants did not attempt to explain why they did not appear upon the trial and thus attempt to excuse neglect.

While the **record** does not disclose any reason whatsoever, we find that the **brief** of the Plaintiff simply stated "On September 5, 1975, the Appellant was out of the state on business." See Page 3 of Appellants brief.

We submit to the Court that this is not excusable neglect. The business of the Court is more important than the business of the Appellant. The Appellant could rearrange his business more conveniently than the Court.

Further, Appellant made **no motion** for a continuance of the trial date but just simply did not show up.

Had the Appellant set out in detail where he was and what he was doing at the time he was legally required to appear in Court for the trial, it would not have constituted excusable neglect under CR 60.02. We cite further from the

case of Richardson vs. Bruner, supra as follows:

"Any action under CR 60.02 addresses itself to the **sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse. Fortney v. Mahan,** Ky., 302 S.W. 2d 842. The record fully authorizes the trial court's finding and conclusion. It is, therefore, the opinion of this Court that there has been no abuse of discretion and that the judgment of the trial court on the first motion should be affirmed."

In the case **Dant v. Progress Paint Mfg. Co.,** 309 S.W. 2d 187 the Court was asked to vacate a judgment.

In upholding the decision of the lower Court in refusing to set aside the judgment, the Court said, and we quote:

"However, the affidavits in support of the motion to vacate do not in any manner undertake to explain Dant's failure to take proof and prepare his case during the eight months between the court's order and the time of judgment. This failure, unexplained, is likewise a sound reason for refusing to vacate it. If no explanation of one's default is offered upon his motion for relief it must be presumed that he has no explanation and is consequently not entitled to the relief provided by CR 55.02 and 60.02.

Nothing in the record undertakes to explain this default and the trial court properly refused to set the judgment aside."

In the case at bar, the defendant's motion did not in any way undertake to explain Appellants failure to appear at the trial of the case on September 5, 1975, which had been

set for trial pursuant to notice by order entered April 28, 1975, a period of more than four months.

In the case of **Pound Mill Coal Company, et al, v. Pennington** 309 S.W. 2d 772, the Defendant moved the Court to vacate the judgment.

In affirming the decision of the Court overruling the motion, the Court said, and we quote as follows:

"We find no merit in appellants' second contention. Appellants had failed to "appear" in the action, and in such cases it is not necessary to serve written notice of the application under CR 55.01, and this section does not require a written notice for judgment to be filed **during the course of a trial.**"

In the case at bar, the Appellants certainly were not entitled to another notice that the case was to be tried, having been notified more than four months prior by order of the Court as to the date of the trials, and thus were not taken by surprise when the judge proceeded to hear the evidence and rendered a judgment against them on the date, which had been set and of which the Appellants admit they were aware.

In the case of **Terra Firma, Inc. v. Krogdahl**, et al, 380 S.W. 2d 86, the Court was asked to set aside a default judgment. The Court of Appeals held that the trial Court did not abuse its discretion in refusing to set the default judgment. We quote from this case as follows:

"A party is not entitled to have a default judgment set aside unless he can show a reasonable excuse and establish

that he has not been guilty of unreasonable delay himself. CR 55.02 and CR 60.02."

In the case of **Ryan v. Collins**, 481 S.W. 2d 85, the Court was asked to set aside a default judgment.

In overruling the motion to set aside the judgment, the court said:

"The same code of procedure which affords an opportunity for relief from a default judgment under CR 55.02 also provides in CR 61.01 that no default in anything done or omitted by any of the parties is grounds for disturbing a judgment unless refusal to disturb the judgment appears inconsistent with substantial justice. This rule also requires the trial court to disregard any defect in the proceeding which does not affect the substantial rights of the parties...

...the granting of relief from a default judgment is a discretionary matter with the trial court. We cannot say that discretion was abused in this case. See **Richardson v. Bruner**, Ky. 327 S.W. 2d 572 (1959). Also see Annotation 153 ALR 449."

In our case, there is no showing by Appellants that their substantial rights have been disturbed nor that the determination of the Court was inconsistent with substantial justice.

In the case at bar, the Appellants had borrowed $10,000.00 (ten thousand dollars) from Verna Capps, the Appellee, an elderly widow, who can ill-afford to lose her life savings, and they did not even appear at the trial to explain why they had failed and refused to repay the loan.

## CONCLUSIONS

The Appellee respectfully requests the Court to affirm the judgment of the lower Court for the folllowing reasons:

(1) The Judgment entered by the Court was not a default judgment, but was a judgment after a trial of the case in the absence of the Appellants on the date upon which the case had been set for trial.

(2) The case had been set for trial on April 28, 1975, to be tried on September 5, 1975, pursuant to motion and notice served upon the Appellants' counsel on April 16, 1975.

(3) The Appellants were aware of the date the case was set for trial. (See admission in Appellants' brief, page 5).

(4) The motion to vacate the judgment failed to explain why the Appellants did not "appear on the appointed day of trial."

(5) No motion was made by Appellants for continuance of the case prior to the trial nor does the record disclose any motion for continuance on the day of trial.

(6) The motion to vacate failed to comply with the requirements of CR 55.02 and 60.02.

(7) There was no showing of excusable negligence or any other reason why the judgment should be vacated.

(8) The judgment was consistent with substantial justice.

(9) The decision of the Court in overruling the motion to vacate the judgment was based upon the sound discretion of the Court.

It is so obvious and apparent that the Appellants are not entitled to the relief sought that it is reasonable to conclude that the appeal is solely for the purpose of delay.

**Respectfully submitted,**

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